Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range	)	ET Docket No. 98-206 RM-9147 RM-9245
	)	
Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates; and	)	
	)	
Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide a Fixed Service in the 12.2-12.7 GHz Band	)	

EX PARTE PRESENTATION OF THE SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION

Andrew S. Wright
Joy O'Brien
SBCA
225 Reinekers Lane
Suite 600
Alexandria, VA 22314

(703) 549-6990
(703) 549-7640 fax

December 21, 2001

NORTHPOINT TECHNOLOGY SHOULD NOT BE ALLOWED TO OPERATE IN THE 12.2-12.7 GHz SPECTRUM BAND DUE TO PROVEN INTERFERENCE TO DBS OPERATIONS; THE ORBIT ACT AND LOCAL TV ACT SUPPORT AUCTIONS OF SATELLITE SPECTRUM USED FOR TERRESTRIAL SERVICES

Northpoint Technology Ltd. ("Northpoint") is actively lobbying the Federal Communications Commission to grant its application to operate a proposed terrestrial point-to-multipoint wireless cable service in the 12.2-12.7 gigahertz ("12 GHz") spectrum band, which the Commission designated for Direct Broadcast Satellite ("DBS") service. Northpoint is asking to operate its proposed service in the DBS band despite the "significant interference threat" to millions of DBS consumers found by studies supplied by both platform providers DIRECTV and EchoStar, and confirmed by a Congressionally-mandated independent test of the proposed service. Further, alternate spectrum bands that are far better suited to Northpoint's proposed technology are available for its use, where mitigation would not be an issue.

Even more outrageously, however, is that Northpoint is demanding that the Commission deviate from a Congressionally-mandated licensing procedure of accepting applications and assigning radiofrequency spectrum via auction. Essentially, Northpoint wants to be granted use of the spectrum for free, giving it a huge advantage over its competitors in the multichannel video marketplace who abided by the rules and paid for use of spectrum at auction.

Northpoint erroneously argues that the Open-Market Reorganization for the Betterment of International Telecommunications Act ("ORBIT Act") prohibits auctions in DBS spectrum used for terrestrial services, and that the Launching Our Communities' Access to Local Television Act of 2000 ("LOCAL TV Act") bars the submission of any applications that would compete with Northpoint's pending application. In fact, both statutes fully support the Commission's authority to conduct an auction for terrestrial use of DBS spectrum.

I. NORTHPOINT SHOULD NOT BE LICENSED TO OPERATE IN 12.2-12.7 GHz SPECTRUM BAND; MORE APPROPRIATE BANDS AVAILABLE FOR MVDDS

Over the past two decades, the Commission and Congress have nurtured DBS service as the best hope for opening the multichannel video programming distribution markets to real competition. During this time, the Commission developed a spectrum management policy for the 12.2-12.7 GHz ("12 GHz") band that established competition among DBS providers and between DBS and other multichannel video programming distribution services. Currently over 16 million American households receive multichannel video programming via DBS. In reliance that the government would protect their subscribers from harmful interference in the DBS spectrum band, both EchoStar and DIRECTV have invested billions of dollars to become viable competitors to cable.

One of the primary benefits of DBS -- a benefit that derives from its satellite architecture -- is that it can and does reach nearly every American home with a high quality digital signal, including homes in remote, rural and underserved areas that otherwise would not receive *any* broadcast or advanced services.

Congress has consistently fostered and championed DBS as a competitor to cable. Presciently fearful of interference to DBS operations from a terrestrial user of the DBS spectrum,

Congress directed the Commission to test Multichannel Video Distribution and Data Service ("MVDDS") proposed to be operated in the 12 GHz spectrum.[1/] *See Section 1012, Prevention of Interference to Direct Broadcast Satellite Services, of the Commerce, Justice, State and Judiciary Appropriations Act*. The Commission charged the MITRE Corporation to prepare the Congressionally mandated test and report. On April 18, the MITRE Corporation delivered its report, entitled "Analysis of Potential MVDDS interference to DBS in the 12.2-12.7 GHz band" (the "MITRE Report"), which the Commission entered into the record of the instant proceeding.

The MITRE Report concludes that Northpoint's proposed service will cause "significant interference" to DBS subscribers. Specifically, the MITRE Report concludes that "MVDDS sharing of the 12.2-12.7 GHz band currently reserved for DBS poses a significant interference threat to DBS operation in many realistic operational situations."[2/] Northpoint claims that only "generic" MVDDS operations threaten interference to DBS service,[3/] however, the MITRE Report reached this conclusion based upon testing of a "single channel MVDDS transmitter supplied by Northpoint."[4/] As the authorizing legislation which led to the MITRE Report makes clear,[5/] Congress does not intend for DBS operations to be jeopardized by harmful interference simply for the sake of authorizing yet another terrestrial video distribution service.

The Commission gave DBS operations band priority over fixed service ("FS") licensees when it allocated the 12.2-12.7 GHz band for DBS use. Fixed services are expressly prohibited from causing harmful interference to DBS operations in the 12 GHz band by footnote 844 of the United States Table of Frequency Allocations.[6/] Northpoint's proposed service is

---

1/ H.R. 5548, Pub. L. No. 106-553, 114 Stat. 2762A-141 (2000).

2/ MITRE Corporation, *Analysis of Potential MVDDS Interference to DBS in the 12.2-12.7 GHz Band*, ET Docket No. 98-206, at xvi (April 2001).

3/ *See, e.g., Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates*, ET Docket 98-206, RM-9147, RM-9245, *Ex parte* Communication of Northpoint Technology Ltd. and Broadwave USA, Inc. (filed April 27, 2001).

4/ *Id.* at 3-13.

5/ Section 1012, Prevention of Interference to Direct Broadcast Satellite Services, of the Commerce, Justice, State and Judiciary Appropriations Act, H.R. 5548, Pub. L. No. 106-553, 114 Stat. 2762A-141 (2000).

6/ 47 C.F.R. § 2.106, n.844; s*ee also* 47 C.F.R. § 101.147(p). In addition, the Rural Local Broadcast Signal Act ("RLBSA"), which was enacted as Title II of the Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. 106-113, 113 Stat. 1501A-544., requires the Commission to "ensure that no facility licensed or authorized" under the statute "causes harmful interference to the primary users of that spectrum," in this case, the DBS service. *See* RLBSA, § 2002(b)(2). Further, Section 303(y) of the Communications Act of 1934, as amended, grants the Commission "authority to allocate electromagnetic spectrum so as to provide flexibility of use, if . . . such use is consistent with international agreements to which the United States is a party, and . . . such use would not result in harmful interference among users." The Commission has indicated that it "interpret[s] the Section 303(y) review requirement as applicable to flexible use determinations by the Commission that would enable the sharing of specific spectrum bands by services treated as distinct by the international and domestic allocations process." *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, 15 FCC Rcd 476, 487 (2000). In any event, Section 303(y) stands as a clear expression of Congress' desire to protect consumers of affected wireless services, and the Commission's

considered a fixed service by the Commission,[7/] and therefore precluded from degrading the quality of service to millions of DBS consumers.

There are spectrum bands better suited to accommodate Northpoint's proposed terrestrial service than 12.2-12.7 GHz. The satellite industry opposes Northpoint's proposal to operate in the DBS band, not out of fear of competition, but out of a desire to keep millions of DBS customers free from harmful interference. In a spirit of constructiveness, not obstruction, the DBS operators asked that the Commission consider housing Northpoint's proposed service in alternate bands to the DBS spectrum.[8/] Licensing MVDDS in a spectrum band more suited to its proposed technology would allow Northpoint and other proponents to get on with their business plans and potentially introduce new competition in the Multi-Channel Video Programming Distribution ("MVPD") market, without causing interference and jeopardizing the welfare of millions of DBS households.

If the Commission were to license a terrestrial wireless point-to-multipoint service (like Northpoint) in the Cable Television Relay Service ("CARS") band (12.7-13.2 GHz) or allow Northpoint to apply for a license in the Multichannel Multipoint Distribution Service ("MMDS") spectrum (2,500-2,690 MHz), Northpoint could begin operation of their proposed service almost immediately. By proactively offering these alternatives to the Commission, the DBS industry has again demonstrated that its opposition to Northpoint's proposed service is due to its proven interference to DBS consumers, not a fear of competition.

II. NO MITIGATION MAY LAWFULLY BE ALLOWED ON THE EQUIPMENT AND PREMISES OF DBS SUBSCRIBERS

If, despite overwhelming evidence of interference by a secondary user to the primary occupant of the band, the Commission moves forward to implement MVDDS in the DBS spectrum based on the availability of mitigation techniques, it is clear that **no mitigation may be effected on the equipment and premises of DBS subscribers**. Mitigation generally refers to notification and coordination and/or technical requirements (such as field strength limits) which are designed to prevent co-primary services (where a first-in-time, first-in-right policy prevails) from interfering with each other – a situation that does not apply to MVDDS operations in the 12 GHz band, where DBS has priority over MVDDS operations. Significantly, these measures are

---

suggestion of burdening millions of DBS consumers by employing mitigation at the DBS consumers' premises clearly contravenes this goal.

[7/] *See, e.g., Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates*, ET Docket 98-206, RM-9147, RM-9245, ¶ 1 ("new terrestrial fixed MVDDS).

[8/] *See, e.g., Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates*, ET Docket 98-206, RM-9147, RM-9245; *Petition for Rulemaking to Amend Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Service*, CS Docket No. 99-250, RM-9257; and *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobil and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, ET Docket No. 00-258; Comments of DIRECTV, Inc. and EchoStar Satellite Corporation (filed December 3, 2001).

implemented at the head-end (base station) facilities of the wireless network for the obvious reason that this is the location where the interfering signal originates and where it is most efficient to remedy interference caused by such signal.

Any proposal of applying mitigation techniques at the DBS receiver location – *i.e.*, the premises of the priority user in the 12 GHz band – is not only inefficient, but is contrary to law and common sense. In effect, such proposal forces DBS users – who own right, title and interest in their equipment and receive their DBS service on a contractual basis – to either accept modifications to their private property by an unrelated third-party, or no longer be able to receive the DBS programming they have contracted to receive from DBS providers. If someone is throwing rocks at a house and breaking the windows, the response is not to require the homeowner to board up the windows. Indeed, SBCA is not aware of any analogous instance where the Commission has required private individuals who are subscribers of primary service to either modify their private property to accommodate a lower priority service, or accept interference that effectively abrogates the terms of their service contracts, which probably explains why the Commission provides no legal, precedential or policy justification for mitigation at the DBS subscriber's premises.[9/]

III. THE ORBIT ACT DOES NOT PROHIBIT THE USE OF COMPETITIVE BIDDING FOR SPECTRUM TO BE USED FOR TERRESTRIAL SERVICES

[9/] The Commission mentions the FM blanketing rules set forth at 47 C.F.R. § 73.318. However, these rules do not support mitigation at the DBS subscriber's premises. Rather, these rules address a form of interference that is a natural by-product of high-powered analog transmissions that affects cheaply produced, mass-market receivers that are not manufactured according to any immunity standards. These receiver problems resulted from the Commission's historic policy of refusing to adopt immunity requirements for such receivers out of concern that such requirements would drive up consumer prices, effectively shifting the burden of compliance with the non-interference rules for free broadcast services from service providers to the public at large. *See, e.g.*, *Radio Frequency (RF) Interference to Electronic Equipment,* Notice of Inquiry, 70 FCC 2d 1685, 1688 (1978); *FM Broadcast Station Blanketing Interference*, Proposed Rule, 47 Fed. Reg. 18936, at ¶ 3 (1982); *FM Broadcast Station Blanketing Interference*, 57 RR 2d 126, at ¶ 24 (1984); *Changes in the Rules Relating To Noncommercial, Educational FM Broadcast Stations*, 58 RR 2d 629, at ¶ 45 (1985) Accordingly, the FM blanketing interference rules represented the Commission's desire "to protect *listeners* of FM radio and viewers of television, *not* other licensees or permittees" without shifting the burden for interference compliance upon the public at large through mandating receiver immunity standards. *Greater Boston Radion, Inc.*, 8 FCC Rcd 4065, at n.1 (1993) (emphasis in original). By contrast, MVDDS interference is not a by-product of MVDDS operations, but rather is an inherent aspect of MVDDS design, which intentionally directs signals of sufficient power into the backlobes of DBS receive antennas, thus causing interference. Further, the problem of MVDDS interference has nothing at all to do with DBS subscriber equipment, which has been carefully and specifically engineered to receive and process 12 GHz satellite transmissions in accordance with international technical standards and the Commission's rules and which is the private property of the subscriber. Section 302 of the Act, 47 U.S.C. § 302a, provides the Commission with authority to set performance standards for unlicensed receivers. Once such receivers have entered the stream of interstate commerce in conformance with the Commission's equipment authorization and marketing rules, however, the Commission's authority over such devices – assuming they do not themselves cause harmful interference – ceases. Mandating "fixes" at the DBS subscriber's premises therefore would unlawfully shift the burden of interference compliance from the regulated *licensee* of the secondary service – MVDDS – to the unregulated *subscriber* of the primary service – DBS – and may constitute a regulatory taking.

The plain language of the ORBIT Act makes clear that Congress did not intend to preclude auctions of licenses for terrestrial services. Northpoint argues that the ORBIT Act prohibits the Commission from auctioning any licenses to operate in the 12 GHz band because that band is allocated for satellite operations. By its terms, however, the ORBIT Act prohibits the use of competitive bidding *only* when the spectrum is "*used for* the provision of international or global satellite communications services."[10/] Northpoint intends to use the spectrum for terrestrial, not satellite, services and, therefore, the ORBIT Act is inapplicable. The plain language of a statute controls its meaning. *See*, *e.g.*, *Caminetti v. United States*, 242 U.S. 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms); *Browder v. United States*, 312 U.S. 338 (1941) (no argument has more weight in statutory interpretation than that a construction is within the plain meaning of the words of the statute).

Northpoint's argument that the ORBIT Act identifies entire bands of spectrum that cannot be auctioned is inconsistent with Congress's purpose in enacting the statute. Notwithstanding the explicitness of the ORBIT Act's language, Northpoint argues that the term "used for" is meant to describe, not limit, the spectrum that cannot be auctioned, and that Congress was merely identifying particular bands of spectrum for exclusion from competitive bidding.[11/] Standard principles of statutory construction contradict this argument. Whether a term is descriptive or restrictive depends on "the general context and structure" of the statute. *United States v. Monjares-Castaneda*, 190 F.3d 326 (5th Cir. 1999), cert. denied, 2000 U.S. LEXIS 1677 (2000). An interpretation cannot "undermine the . . . purposes that Congress intended." *See, e.g.*, *United States v. Herring*, 602 F.2d 1220, 1223 (5th Cir. 1979).

Legislative history relating to an identical provision in a precursor bill to the ORBIT Act (there is no explanatory statement on the ORBIT Act's auction prohibition) demonstrates that Congress enacted the legislation to prevent the proliferation of auctions for international satellite authorizations, a problem *unique to satellite services.* As the House Commerce Committee explained:

> The Committee believes that auctions of spectrum or orbital locations could threaten the viability and availability of global and international satellite services because concurrent or successive spectrum auctions in the numerous countries . . . could place significant financial burdens on providers of such services."[12/]

These concerns simply do not exist in the context of auctions for terrestrial licenses because a terrestrial allocation would apply (and auctioning would occur) solely within the United States. Further, by extending the ORBIT Act's limited exception to the Commission's general authority to auction spectrum far beyond the specific problem Congress sought to

[10/] 47 U.S.C. § 765(f) (emphasis added).

[11/] *See, e.g., Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates*, ET Docket 98-206, RM-9147, RM-9245, Reply Comments of Northpoint Technology Ltd. and Broadwave USA, Inc. at 6-7 (filed April 5, 2001).

[12/] H.R. REP. NO. 105-494, at 64-65 (1998).

address, Northpoint's interpretation would contravene the congressional decision to favor competitive bidding in most circumstances.[13/]

The ORBIT Act does not prohibit the use of auctions for satellite services if the services are solely domestic. In signing the ORBIT Act into law, President Clinton stated his "understanding that section 647 does not limit the Federal Communications Commission from assigning, via competitive bidding, domestic satellite service licenses intended to cover only the United States." *Statement by President William J. Clinton upon signing S. 376, 36 WEEKLY COMP. PRES. DOC. 78 (Mar. 17, 2000)*. Since Congress granted the Commission authority to allocate spectrum via auction in 1993, EchoStar, one of the DBS providers, paid $52.3 million for one of its licenses in a government auction, and also acquired a license for which MCI paid $682.5 million in a government auction. DIRECTV, another DBS provider, acquired a license (awarded before the Commission was granted auction authority) and two satellites from Tempo Satellite, Inc. for $500 million.

In general, statutory language is considered descriptive when it serves as an aid to interpreting a word or phrase that would otherwise not be clear. *See*, *e.g.*, *Monjares-Castaneda* (finding that parenthetical term in statute was an "aid to identification" because without it, determining what was covered by the statute would have been a "long and arduous process"); *United States v. Galindo-Gallegos*, 244 F.3d 728, 734 (9th Cir. 2001) ("The function of the descriptive language appears to be to make reading the statute easier, so that one does not have to look up each citation to see what it is about, and to protect against scrivener's error in getting the statute from the drafting desk to the United States Code"); *United States v. Herring*, 602 F.2d at 1223 (same). Statutory language is more properly understood as restrictive when it serves the purpose of limiting the reach or applicability of a provision. *Monjares-Castaneda*, 190 F.3d at 330; *Galindo-Gallegos*, 244 F.3d at 734. Congress's deliberate choice of the phrase "used for" in the ORBIT Act clearly is restrictive, *i.e.*, only "international or global satellite communications" *uses* are exempt from competitive bidding. If Congress had been seeking to describe specific bands of spectrum, as Northpoint contends, it would have referred to them with regard to their frequencies or allocation rather than with regard to particular services. *Cf.* 47 U.S.C. § 309(j)(14)(C)(ii) ("spectrum reclaimed pursuant to clause (i)"); 47 U.S.C. § 309 nt (Balanced Budget Act of 1997 § 3008) ("frequencies assigned under this title").

***National Public Radio v. FCC* does not support Northpoint's ORBIT Act argument.** Contrary to Northpoint's arguments,[14/] the decision of the U.S. Court of Appeals for the D.C. Circuit in *National Public Radio v. FCC*, 254 F.3d 226 (D.C. Cir. 2001), does not support its reading of the ORBIT Act. In fact, section 309(j) is structured entirely differently than the ORBIT Act and offers no aid to discerning the latter statute's meaning. The *NPR* court simply held that section 309(j)(2) of the Communications Act denies the Commission the authority to use auctions for any licenses "issued . . . for . . . [noncommercial educational broadcasters ("NCEs")]"[15/] As the court made clear, the language of Section 309(j)(2) explicitly exempts

---

[13/] *See* 47 U.S.C. § 309(j)(3) (directing the Commission to use competitive bidding to "promot[e] economic opportunity and competition").

[14/] Northpoint Ex Parte at 1.

[15/] *National Public Radio*, 254 F.3d at 227.

NCEs from Section 309(j)'s general auction requirement. By sharp contrast, the ORBIT Act does not exempt particular *applicants* from competitive bidding. Nor, as Northpoint contends, does the ORBIT Act set aside entire *bands* of spectrum for auction-free treatment. Rather, the ORBIT Act's exemption is based on the *use* the applicant plans to make of the licenses. Accordingly, neither the ORBIT Act nor *National Public Radio* (by implication) imposes any restrictions on the Commission's ability to auction spectrum intended for terrestrial use.

The FCC has held that the ORBIT Act's auction limitation does not apply to terrestrial authorizations. The Commission already has rejected Northpoint's arguments that the ORBIT Act precludes all auctions in these circumstances, holding that the ORBIT Act "does not prohibit the Commission from auctioning licenses for non-satellite services,"[16/] and that when it "establishes a terrestrial service . . . the ORBIT Act is not a bar to auctioning licenses merely because the terrestrial service operates on the same frequencies as a satellite service"[17/] Nothing has changed since that decision that would warrant a different answer. Indeed, notwithstanding the enactment of the ORBIT Act, the Commission has continued to use auctions to award licenses for the terrestrial use of spectrum in the 24 GHz and 39 GHz bands, which are also allocated for satellite services.[18/] The Commission also intends to auction licenses for fixed and mobile terrestrial services in a band (3690-3700 MHz) in which fixed satellite service operates, and it expressly determined that "the assignment of licenses for terrestrial services by competitive bidding . . . is not prohibited by the [ORBIT Act]."[19/]

Northpoint is essentially arguing that the government favor Northpoint over its potential wireless competitors. Auctions for spectrum that is assigned for wireless cable and broadband services functionally identical to the service proposed by Northpoint (Local Multipoint Distribution Service, Multipoint/ Multichannel Distribution Service, Wireless Communications Service and 39 GHz) have raised over $1.2 billion for the Treasury. Northpoint is now asking

---

[16/] *In the Matter of Amendment of Parts 2 and 2 of the Commission's Rules to Permit Operation of NGSO FSS Sys. Co-Frequency with GSO and Terrestrial Sys. in the Ku-Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7GHz Band by Direct Broadcast Satellite Licensees and their Affiliates and; Applications of Broadwave USC, PDC Broadband Corp. and Satellite Receivers, Ltd. to Provide a Fixed Serv. in the 12.2-12.7 GHz Band,* ET Docket No. 98-206, RM-9147, RM-9245*, First Report and Order and Further Notice of Proposed Rule Making*, 16 FCC Rcd 4096 ¶ 326 (2000*).*

[17/] *Id.* Indeed, if Northpoint's interpretation were correct, the Commission would never be able to auction spectrum in any band that was used for satellite service when the statute was enacted, even if the band were entirely reallocated to terrestrial use. Such an interpretation would not further the purposes of the statute, and would not be consistent with the treatment of any other band of spectrum. *See Herring*, 602 F.2d at 1223 (statutory interpretations cannot undermine Congress' intended purposes); 47 U.S.C. § 309(j) (favoring competitive bidding to "promot[e] economic opportunity and competition").

[18/] *Amendment to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Servs. at 24* WT Docket No. 99-327*,* Report and Order, 15 FCC Rcd 16934 (2000); *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands,* ET Docket No. 95-183*,* Report and Order and Second Notice Proposed Rule Making, 12 FCC Rcd 18600 (1997) and *39 GHz Band Auction Closes*, DA 00-1035, Report No. AUC-30-E, Public Notice, 15 FCC Rcd 13648 (2000).

[19/] *Amendment of the Commission's Rule with Regard to the 3650-3700 MHz Gov't Transfer Band, First Report and Order and Second Notice of Proposed Rulemaking,* 15 FCC Rcd 20488 ¶ 20 n.64 (2000).

for a preference and a competitive advantage over its wireless services competitors who have already paid for their spectrum and who must obtain any additional spectrum by auction.

If Congress had intended to limit the Commission's authority to auction any spectrum in the DBS band, it would have done so directly. Northpoint provides no explanation for why Congress did not explicitly prohibit auctions for all uses (including terrestrial) of all spectrum in the 12 GHz band if that was its intention. Congress has explicitly identified spectrum bands when it wished to accord special treatment to the entirety of those bands. *See, e.g.*, 47 U.S.C. § 337(a) ("spectrum between 746 megahertz and 806 megahertz, inclusive"); 47 U.S.C. § 925 nt (Balanced Budget Act of 1997 § 3002(c)(3) and (4)) ("spectrum at 2,110-2,150 megahertz" and "15 megahertz from spectrum located at 1,990-2,110 megahertz"). It did not do so in the ORBIT Act. Nor does the ORBIT Act exempt certain types of applicants from competitive bidding, as occurs elsewhere in the Communications Act. *Cf., e.g.*, 47 U.S.C. § 309(j)(2)(A) ("State and local governments and non-government entities"); 47 U.S.C. § 309(j)(2)(B) ("existing terrestrial broadcast licensees"). The absence of an explicitly stated restriction on the Commission's competitive bidding authority when such limitations were provided in other legislation regarding spectrum auctions demonstrates that Congress did not intend for the ORBIT Act to deprive the Commission of such authority. *See, e.g., Moshe Gozlon-Peretz v. United States*, 498 U.S. at 404 (when Congress includes language in one section of a statutory scheme but omits it in another, the exclusion is presumed "intentional[] and purposeful[]"); *Russello v. United States*, 463 U.S. at 78 (same).[20/]

IV. THE LOCAL TV ACT DOES NOT ESTABLISH A DEADLINE FOR APPLICATIONS FOR TERRESTRIAL AUTHORIZATIONS IN THE DBS BAND

Northpoint claims that it is too late for the Commission to accept competing applications for terrestrial authorizations in the DBS band because "only Northpoint successfully completed the independent technical demonstration required by Section 1012(a) of the LOCAL TV Act" under the deadlines established in section 1012(b) of that statute.[21/] This claim is without foundation. The LOCAL TV Act establishes no cut-off for the submission of applications. Northpoint misreads the plain language of the LOCAL TV Act, and its interpretation is flatly inconsistent with basic principles of statutory construction.

Section 1012(a) of the LOCAL TV Act directs the Commission to:

> provide for an independent technical demonstration of any terrestrial service technology proposed by an entity that has filed an application to provide terrestrial service in the direct broadcast satellite frequency band to determine whether the terrestrial service

[20/] That the relevant statutory section is entitled "*Satellite* Auctions" (emphasis added) provides further evidence that Congress meant to limit the Commission's competitive bidding authority only with regard to satellite auctions, not auctions for terrestrial use of spectrum. *See Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co. et al.*, 331 U.S. 519, 529 (1947) (titles may be used as "tools available for the resolution of a doubt" when they "shed light on some ambiguous word or phrase").

[21/] *Ex parte* communication in ET Docket No. 98-206 of Northpoint Technology, Ltd (filed Sept. 19, 2001) ("Northpoint Ex Parte"); *see also Ex parte* communication in ET Docket No. 98-206 of Northpoint Technology, Ltd (filed Nov. 2, 2001).

technology proposed to be provided by that entity will cause harmful interference to any direct broadcast satellite service.

Section 1012(a) does not establish any timelines for the filing of applications or for the completion of the required technical demonstrations. Northpoint nevertheless contends that a limitation on the ability to submit applications and conduct technical demonstrations is established by section 1012(b), which provides that:

> In order to satisfy the requirement of subsection (a) *for any pending application*, the Commission shall select an engineering firm or other qualified entity . . . to perform the technical demonstration or analysis. The demonstration shall be concluded within 60 days after the date of enactment of this Act . . .

47 U.S.C. § 1110(b) (emphasis added).

As discussed below, the plain meaning and structure of the LOCAL TV Act contradict Northpoint's assertion that Congress impliedly precluded any additional applications for terrestrial service in the DBS band.

The plain language of the LOCAL TV Act creates no cut-off for the submission of additional terrestrial license applications. By its terms, the schedule for the technical analysis established by section 1012(b) applies only to "*pending* application[s]." Indeed, Northpoint itself argues that "Congress . . . established a clear, strict deadline for carrying out the independent technical demonstrations of the technologies proposed by those with 'pending' applications."[22/] If the time limits of section 1012(b) were meant to apply to *all* applications, there would have been no reason for Congress to use the word "pending" in that subsection. The Commission has no authority to look beyond the plain language of the statute and apply the 60-day limit to applications other than the applications that were pending when section 1012(b) was enacted. *See*, *e.g.*, *Caminetti v. United States*, 242 U.S. 470, 485; *Browder v. United States*, 312 U.S. 335, 338. *See also Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 n.3 (3rd Cir. 1981) (an administrative agency may act only within its clear statutory mandate); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708-09 (1979) (same).

Northpoint's contention that the LOCAL TV Act forever bars all parties other than Northpoint from applying for 12 GHz terrestrial licenses does not comport with the structure of the statute. Northpoint's reading of section 1012(b) to prohibit any additional applications would effectively read section 1012(a) out of the statute. Subsection (a) requires the Commission to ensure that all new technologies proposed by any applicant for a terrestrial license in spectrum occupied by DBS licensees are tested for interference. That requirement would be rendered mere surplusage if, as Northpoint contends, Congress only intended for the Commission to arrange for the testing of technologies advanced by parties with applications pending on the date the LOCAL TV Act was enacted. Under Northpoint's interpretation, section 1012(b) could stand alone and there would have been no reason for Congress to have passed section 1012(a). Northpoint's proffered interpretation of section 1012 conflicts with the elementary rule of statutory construction that Congress intends each word, phrase and sentence

[22/] *See id.*

in a statute to have independent effect, and statutory language cannot be interpreted to render any word, phrase or section meaningless or superfluous. *See, e.g., United States v. Menasche*, 348 U.S. 528, 538 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section . . .") (internal citations omitted); *Davis v. San Francisco*, 976 F.2d 1536, 1551 (9th Cir. 1992) ("the Supreme Court has repeatedly declared [it] to be the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative") (internal citations omitted); *id.* at 1553 ("The Supreme Court has repeatedly declared that the task of discerning Congressional intent is well-served by adherence to the rule that statutes should not be construed in a manner which robs specific provisions of independent effect."); *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994) (statutory terms cannot be treated as "surplusage").

The general testing requirement of section 1012(a) is not trumped by the specific deadline of section 1012(b). As noted above, section 1012(a) sets forth a general rule requiring the Commission to ensure that an independent interference study is conducted with regard to any terrestrial DBS technology proposed by any applicant to provide terrestrial service in the DBS band. In contrast, section 1012(b) sets forth a more specific rule for the treatment of applications *pending* at the time of enactment. Subsidiary provisions meant to establish a specific exception to an otherwise general rule must be narrowly construed, and cannot be given a broader focus that would trump the more general terms and purpose of a statutory provision at issue.[23/] *See United States v. Menasche*, 384 U.S. at 536-39 (a specific subsection trumps a more general rule but must be interpreted strictly according to its terms and cannot overcome the "broad sweep" of the general rule);[24/] *United States v. McElvain*, 272 U.S. 633, 639 (1926) (exception is "to be construed strictly, and held to apply only to cases shown to be clearly within its purpose"); *United States v. Scharton*, 285 U.S. 518, 521-22 (1932) (excepting clauses are to be narrowly construed); *Edward Marks Music Corp. v. Colorado Magnetics, Inc.*, 497 F.2d 285 (10th Cir. 1974) (exceptions should be strictly construed so that they do not "devour the general policy which a law may embody"); *Waters v. United States*, 328 F.2d 739 (10th Cir. 1964) (exceptions to a general rule must be strictly construed to apply only to what is specifically listed). When a general provision in a statute has certain limited exceptions, all doubts should be resolved in

[23/] That Northpoint's interpretation is incorrect is further buttressed by the fact that the time limit is expressed in a separate subsection, and not as a proviso to subsection 1012(a). *See* Sutherland Statutory Construction § 47.11.

[24/] In *United States v. Menasche*, the Court considered and rejected a statutory analysis similar to the interpretation now advanced by Northpoint. The statute at issue provided in subsection (a) a general rule that the validity of any declarations of intention to become a citizen or other similar petition would not be altered by the Act's passage, and a more specific rule in subsection (b) that applications pending at the time of enactment should be heard and determined under the law in effect at the time of application. The alien at issue had an apparent right to citizenship based on papers he had filed at the time of enactment, but because he had not yet filed an application for citizenship, the government contended that he was not protected by subsection (b), and thus was subject to the new law (under which he did not qualify for citizenship). The Court found that the alien's right to citizenship was protected by subsection (a), and "not defeated by any implication stemming from [subsection (b)]." The Court found that while subsection (b) provided a specific rule for the treatment of applications pending at the time of enactment, it could not trump the more general provisions of subsection (a), because "[t]he Government's contention that § 405(a) does not apply to any phase in the processing of naturalization petitions would defeat and destroy the plain meaning of that section. The cardinal principle of statutory construction is to save and not to destroy." *Id.* at 538-39.

favor of the general provision rather than the exceptions. *See, e.g., Doe v. Bridgeport Police Dept.*, 2000 U.S. Dist. LEXIS 19329, *27-28 (D. Conn. 2000); *see also* Sutherland Statutory Construction § 47.11 (1992). Persons claiming the benefit of the exception have the burden of proving that their claim comes within the exception. *See Bridgeport Police Dept.*, 2000 U.S. Dist. LEXIS at * 28; Sutherland Statutory Construction § 47.11. Northpoint's interpretation of the LOCAL TV Act plainly is incorrect because it would elevate the specific deadline of section 1012(b) above the general requirement in section 1012(a) that the Commission provide for the testing of all proposed terrestrial technologies.

If Congress wanted to prohibit the Commission from accepting applications other than those fortuitously filed by the date of the LOCAL TV Act's enactment, it would have done so directly. Northpoint's argument that Congress meant to preclude the Commission from accepting any terrestrial DBS applications other than those "pending" at the time of the LOCAL TV Act's enactment is especially baseless, considering that the Commission still has not requested the submission of such applications. The Commission's Public Notice soliciting applications established a cut-off date only for non-geostationary satellite orbit fixed *satellite service* applications -- and did not even address terrestrial service applications.[25/] Thus, any terrestrial service application that was "pending" at the time of the statute's enactment was pending because it had been filed prematurely.[26/] If Congress had meant to establish such a deadline, it would have done so directly. Indeed, in other parts of the LOCAL TV Act, Congress specifically directed the Commission not to accept particular filings. *See*, *e.g.*, section 1007(a)(2), 47 U.S.C. § 1106(a)(2) (precluding petitions to deny major modifications of cellular applications). The fact that explicit language precluding the submission of certain documents is set forth in section 1007 but not in section 1012 undermines Northpoint's argument that such a limitation should be read into section 1012. *See, e.g., Moshe Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1990) (when Congress includes language in one section of a statutory scheme but omits it in another, the exclusion is presumed "intentional[] and purposeful[]"); *Russello v. United States*, 463 U.S. 16, 23, 78 (1983) (same).

[25/] *See Public Notice, Cut-off Established for Additional Applications and Letters of Intent in the 12.75-13.25 GHz, 13.75-14.5 GHz, 17.3-17.8 GHz and 10.7-12.7 GHz Frequency Bands* (International Bureau rel. Nov. 2, 1998) ("This Public Notice establishes the cut-off date for additional non-geostationary satellite orbit ("NGSO") fixed-satellite service ("FSS") systems seeking to operate in the above frequencies."); *see also id.* ("In order to facilitate the [Skybridge] licensing proceeding, we invite competing NGSO FSS applications to be filed in the above frequency bands before we adopt rules for NGSO FSS systems in those bands"); *id.* (specifying three forms of acceptable requests that may be filed in response to the Notice, all dealing with satellite applications).

[26/] Northpoint argues, based solely on the fact that the Commission earlier issued a notice of proposed rulemaking that dealt with both satellite and terrestrial applications, that despite its clear language, the Public Notice "put not only NGSO-FSS applicants but also terrestrial applicants . . . on notice as well." *Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates*, ET Docket 98-206, RM-9147, RM-9245, Reply Comments of Northpoint Technology Ltd. and Broadwave USA, Inc. at 5 (filed April 5, 2001). As to terrestrial services, however, the notice does not meet the "reasonably comprehensible" standard established by the D.C. Circuit. Notice of a cut-off date must be "reasonably comprehensible to [people] of good faith." *McElroy v. FCC et al.*, 990 F.2d 1351, 1358 (D.C. Cir. 1993), *quoting Maxcell Telecom Plus, Inc. v. FCC*, 815 F2d 1551, 1558 (D.C. Cir. 1987). A cut-off notice that makes no mention of the service to which it allegedly applies -- particularly one that has yet to be established -- is not "reasonably comprehensible." *McElroy*, 990 F.2d at 1358-1360.

* * *

As the foregoing demonstrates, Northpoint's proposed terrestrial wireless cable service, which would operate as a secondary user in the 12.2-12.7 GHz spectrum, will threaten DBS operations significantly if Northpoint is granted its application. Options exist for Northpoint to operate its proposed system in alternate bands, where professed fears of technological incompatibility are assuaged. Accordingly, Northpoint's application should be denied. Furthermore, there is no support for Northpoint's egregious contention that the Commission lacks the authority to distribute licenses for MVDDS via competitive bidding or to accept any additional applications for MVDDS. Contrary to Northpoint's claims, the ORBIT Act does not preclude the Commission from auctioning non-satellite licenses even if the terrestrial services will share spectrum with DBS licensees and the LOCAL TV Act does not establish a cut-off date for the submission of additional applications by potential MVDDS operators.